Proposed Access to Information and Protection of Privacy Act

Commentary

Province of British Columbia
Ministry of Provincial Secretary

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FOREWORD

The purpose of the proposed legislation is to provide two basic rights:

- the right of the public to access information in government records; and
- the right of the individual to have his or her personal information in government records protected from unauthorized collection, use and disclosure.

The proposed Act balances these fundamental rights with the legitimate need for confidentiality in limited and specific circumstances.

The proposed Act is modelled on access and privacy legislation in other Canadian jurisdictions.

This commentary provides a summary of the key provisions in the proposed Act. It is not a legal interpretation of the proposed Act.

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PART 1 - INTRODUCTORY PROVISIONS

Purpose

There are two distinct aspects of this proposed legislation: the right of the public to access "government" information, and the right of individuals to the protection of privacy of their own personal information. Protection of personal information includes restrictions on collection, use, and disclosure of that information.

Specifically, the purposes of the proposed legislation are:

1. to give the public a right of access to information in government records, subject to limited and specific exemptions;

2. to give individuals a right of access to personal information about themselves in government records, subject to limited and specific exemptions;

3. to give individuals a right to request correction of personal information about themselves in government records;

4. to protect personal information from being disclosed to anyone except the individual the information is about, or as authorized by or under this or another Act; and

5. to provide for an independent review of decisions made under this Act. [Section 2]

Coverage

The proposed Act will cover all provincial government organizations; it parallels the existing coverage of the Ombudsman Act in that it will not cover the courts, universities, colleges or local government agencies. Crown corporations with share capital held outside government will also be excluded.

The proposed Act will not extend to MLA's offices, the Clerk's office or that of the Ombudsman, Auditor General, Conflict of Interest Commissioner or Access and Privacy Commissioner. [Section 1].

Scope

The proposed Act will not apply to published material or material placed in the British Columbia Archives by someone other than a government organization. It will also not limit the information otherwise available to a party in litigation. [Section 3]

Primacy over Other Legislation

The proposed Act provides that within two years after Royal Assent, it will prevail over provisions respecting access and confidentiality in other statutes. During the intervening period, it will be necessary to review provincial statutes to identify specific provisions which should prevail notwithstanding the Act. [Section 4]

PART 2 - PUBLIC ACCESS TO GOVERNMENT RECORDS

Right of Access

This Part will provide a right of access to government records, unless they contain information that is exempted from disclosure under the proposed Act and that information cannot reasonably be severed from the record. [Section 5]

It outlines how and where an applicant will request access and provides for a 30-day period for the government organization to respond. This time limit may be extended in certain circumstances. The applicant will be permitted to examine the record or be given a copy where the record can be easily reproduced. [Sections 6-12]

Information Exempted From Disclosure

This Part also outlines what information will be exempted from access. Exemptions are divided into two categories: mandatory exemptions (information that must not be released); and discretionary exemptions (information that may be released at the discretion of the head of the organization).

Mandatory Exemptions

Mandatory exemptions in the proposed Act will cover the following areas:

- Personal information, except as permitted in the section dealing with access by individuals to their own personal information (Part 3 of the Act). [Section 13]

- Confidences of the Executive Council, including information in an agenda, minute and other record of discussions or decisions; submissions presented or about to be presented to Cabinet or its committees; briefing papers prepared for ministers on Cabinet issues; communications between ministers on matters related to Cabinet business; and draft legislation.

The Cabinet exemption will not apply to records over 20 years old or to decisions of Cabinet when it hears appeals under an Act. [Section 14]

- Proprietary information of commercial value supplied in confidence by a third party to government that, if released, could reasonably be expected to harm significantly the competitive position of that third party, or result in undue loss or gain to someone. [Section 15]

  Where it is uncertain that the exemption applies, the government organization must notify the third party of its intention to disclose and allow that party the opportunity to agree to release the information, or to appeal the decision to the Access and Privacy Commissioner. [Sections 16 and 17]

  Such information may be disclosed in exceptional circumstances, without prior notification to the third party, if the public is subject to a grave health, safety or environmental hazard and the public interest in disclosure clearly outweighs the interest served by not releasing the information. [Section 18]

Discretionary Exemptions

Discretionary exemptions in the proposed Act will cover the following areas:

- Information that could threaten anyone's safety or health or interfere with public safety. [Section 19]

- Information that is obtained in a lawful investigation or related to the existence of a particular investigation, where that information is less than 20 years old; or information that could harm the conduct of a lawful investigation, could be harmful to any law enforcement matter, or could reveal the identity of a confidential source of law enforcement information. [Section 20]

- Information that is subject to solicitor-client privilege. [Section 21]

- Information that was received in confidence from another government unless that government or Cabinet agrees to its release; or information that, if disclosed, could be harmful to the conduct of intergovernmental relations. [Section 22]

- Information relating to the economic interests of a government organization, such as trade secrets, commercial or other information, that could have a monetary value; or information that would reveal the bargaining position of the organization in its negotiations; or information that could result in the premature disclosure of a proposal or project, or result in undue financial benefit or loss to a person. [Section 23]

- Information that could harm the security of government facilities, including those provided under contract to government. [Section 24]

- Information that could interfere with the conservation of heritage sites, fossil sites or endangered species. [Section 25]

- Information that would reveal advice or recommendations developed by or for government, if that information is less than 20 years old. This exemption does not include factual information, statistical surveys, polls, environmental impact studies, consumer test reports, technical reports including a cost estimate, or reasons for a decision in the exercise of a discretionary power or adjudicative function. [Section 26]

- Information that is to be published, or will be released to the public, within 60 days of the applicant's request. [Section 27]

The government organization must not refuse to disclose information where there is reason to believe that the public may be subject to a grave health, safety or environmental hazard and the interests of the public clearly outweigh the interests served by refusing to disclose the information. [Section 28]

PART 3 - ACCESS BY INDIVIDUALS TO THEIR OWN PERSONAL INFORMATION

Right of Access to Personal Information

This Part establishes the right of an individual to obtain access to information held by government about that individual. [Section 30]

The proposed Act provides a detailed outline of what constitutes personal information which, in addition to the normal "tombstone data", includes information on a person's medical, educational, financial, employment, or criminal background and includes anyone else's opinions of that person, or that person's personal views or opinions, except if they relate to another person. [Section 29]

Personal information does not include such things as a government employee's employment status, position description, salary or travel expenses; the details of a service contract with government or of the receipt of a discretionary benefit from government, such as a licence or permit. [Section 29]

Procedures are set out for applying for personal information, which parallel the procedures in Part 2. [Sections 31 and 32]

Correction of Personal Information

An individual who believes there is an error or omission in his or her personal information will have a right to request that the government organization correct the record. Proven errors will be corrected. If the government does not correct the record, a note of any correction that was requested must be appended to the record. [Section 33]

Information Exempted From Disclosure

This Part also outlines what personal information will be exempted from access. Exemptions are divided into two categories: mandatory exemptions (personal information that must not be released) and discretionary exemptions (personal information that may be released at the discretion of the head of the organization).

Mandatory Exemptions

Mandatory exemptions in the proposed Act will cover the following areas:

- Personal information the disclosure of which is prohibited by an Act or regulation. [Section 34]

- Personal information that would constitute an unjustifiable invasion of another person's privacy. [Section 35]

  If the government organization is uncertain whether disclosure of the personal information may constitute an invasion of privacy, the organization must notify the person of the intended disclosure and provide an opportunity to appeal to the Access and Privacy Commissioner. [Sections 35 and 36]

- Personal information about an individual that would reveal confidences of the Executive Council, unless the information relates to the decision from a Cabinet appeal or is over 20 years old. [Section 37]

Discretionary Exemptions

Discretionary exemptions in the proposed Act will cover the following areas:

- Personal information that was obtained or prepared in the course of a lawful investigation, if that information is less than 20 years old; or personal information that could be harmful to a law enforcement matter, or could be expected to harm the custody of a person under sentence, or could identify a confidential source of law enforcement information. [Section 38]

- Personal information that is subject to solicitor-client privilege. [Section 39]

- Personal information if, in the opinion of an expert, disclosure could harm the safety or the mental or physical health of the individual concerned or another person. [Section 40]

- Personal information supplied to government in confidence by a third party where that information is required for the operation of a government program, and the release of the information could reveal the identity of the third party, and it is in the public interest that the information not be disclosed. [Section 41]

  This provision also covers information provided by employees, but only for the period before the Act comes into force. [Section 41]

- Personal information that was received in confidence from another government unless that government or Cabinet agrees to its release; or personal information that, if disclosed, could be harmful to the conduct of intergovernmental relations. [Section 42]

PART 4 - PROTECTION OF PRIVACY

Collection of Personal Information

No personal information may be collected by government unless the collection of that information is expressly authorized by law, is required for law enforcement, or is required for the administration of a government program. [Section 43]

Wherever possible, personal information must be collected directly from the individual that it is about, unless the individual consents otherwise, or it would result in the collection of inaccurate information, or it would defeat the purpose or prejudice the use for which the information is collected. [Section 44]

Government must take reasonable care to protect the security of personal information that it collects and holds. [Section 45]

Use of Personal Information

A government organization must not use personal information except: for the purpose for which it was collected; or for a consistent purpose; for a use consented to by the individual; or for a purpose for which information may be disclosed as described below. [Section 47]

Disclosure of Personal Information

Personal information may only be used or disclosed as follows [Section 49]:

- for the purpose of complying with another Act;
- for the purpose of complying with a subpoena, warrant or court order;
- to the Attorney General for use in civil proceedings involving the government;
- for the purpose of collecting a debt owing to the government or making a payment owed by the government;
- for audit purposes or personnel matters relating to government;
- to a member of the Legislative Assembly who has authorization to assist that individual;
- to a member of the individual's bargaining agent who has the authorization of that individual;
- to the British Columbia Archives and Records Services for archival purposes;
- to another government organization or law enforcement agency to aid in a lawful investigation from which a law enforcement proceeding is likely to result;
- where the head of the organization determines that there are compelling circumstances that affect the health or safety of an individual.

Personal information may be disclosed for research and statistical purposes where the purpose cannot be achieved without the use of personal information, and where the conditions of the research are such that individual identifiers are removed as soon as practicable and the security and confidentiality of personal information is assured. [Section 50]

Personal information in the possession of the Archives and Records Service may be disclosed for archival and historical proposes where such disclosure would not constitute an unjustifiable invasion of privacy or the research and statistical provisions apply. [Section 51]

Personal information may be disclosed where there is reason to believe that there is a grave health or safety risk to the public, and the public interest in disclosure clearly outweighs the invasion of privacy that could result from disclosing the personal information. There will be an obligation on the part of the government organization to notify the individual whose privacy would be invaded and to notify the Commissioner. [Section 52]

PART 5 - INFORMATION AND PRIVACY COMMISSIONER

Appointment

The Commissioner will be appointed by the Lieutenant-Governor following the approval by two-thirds of the Legislature of a motion of appointment submitted to the Legislative Assembly by the Premier. [Section 53]

The Commissioner will be an officer of the Legislature and hold office for a term of five years. [Section 53]

There are provisions in the proposed Act for the removal and suspension, plus the power to appoint an acting Commissioner when the House is not in Session. [Section 54 and 55]

The Commissioner, like the Ombudsman and Auditor General, will have a salary equivalent to that of the Chief Judge of the Provincial Court. The staff of the office will be public servants and will be excluded from collective bargaining. There is also a section in the proposed Act which will permit the Commissioner to report to the House if the Commissioner believes that the budget or staff allocation is not appropriate. [Sections 56 and 57]

General Powers of the Commissioner

In addition to the power to hear appeals which is dealt with in Part 6 of the Act, the Commissioner will have the power to:

- receive comments and complaints from the public concerning the Act;
- engage or commission research related to the purposes of the Act;
- comment on the implications for access and privacy protection of proposed government programs or legislative schemes; and
- conduct investigations to ensure compliance with any provision of the Act such as: investigating whether a time limit has been unreasonably extended; a fee is inappropriate; correction of personal information has been refused without justification; or personal information has been collected, used or disclosed in an unauthorized manner. [Section 58]

In carrying out an investigation under this Act, the Commissioner will have the powers and protections of a commissioner under the Inquiry Act. [Section 61]

Where the investigation relates to time limits, payment of fees, or how personal information has been used or disclosed, the Commissioner may make recommendations. In matters relating to the collection of personal information or the correction of personal information, the Commissioner may make binding orders. [Section 59]

The Commissioner and the staff of his office may not disclose any information obtained in the performance of their duties. [Section 64]

The Commissioner will be able to delegate his powers, except the power to make binding orders and the right to examine documents related to Cabinet confidentiality. [Section 66]

The Commissioner will be required to submit an annual report to the Legislative Assembly on the work of the Commissioner's office. [Section 68]

PART 6 - APPEALS TO THE COMMISSIONER

An applicant will be able to appeal to the Commissioner a decision made by the government organization in respect of:

° a request for access to a government record; and

° a request for access to the applicant's personal information. [Section 69]

A third party will be able to appeal the release of information about them as provided in the access and privacy parts of the Act. [Section 70]

The appellant must register their notice of appeal with the Commissioner within 20 days on being notified of the decision giving rise to their appeal. [Section 71]

The Commissioner may authorize a mediator to investigate the circumstances and try and settle the matter. The Commissioner must investigate the matter if no settlement is reached in mediation and may conduct the investigation in private. [Section 73 and 74]

The onus of proof arising from the refusal to grant access to a record is on the government organization to show that the organization is entitled, or required to refuse to disclose the information requested. [Section 77]

After the evidence is received, the Commissioner must make an order disposing of the issues raised in the appeal. If the Commissioner finds that the organization is not entitled or required to refuse access, he must order the organization to grant access. [Section 75]

If the Commissioner finds that the organization is entitled to refuse access, the Commissioner may refer the decision back to the head of the organization, but must not order the organization to grant access. [Section 75]

If the Commissioner orders disclosure, the government organization must comply within 30 days. [Section 76]

PART 7 - GENERAL PROVISIONS

The proposed Act will permit the heads of organizations to delegate their powers. [Section 78]

There will be a provision in the legislation providing immunity from civil suit for persons exercising their official duties under the proposed Act. [Section 80]

The proposed Act will make it an offence to mislead or obstruct the Commissioner or another person in the discharge of their duties under the proposed Act. It will also be an offence not to comply with a Commissioner's order. [Section 81]

There will be provision for the payment of fees for processing a request, locating and retrieving records, preparing records for disclosure and providing copies of records. No fee will be charged for access to personal information that is easily accessible. [Section 82]

The power to make regulations will include [Section 83]:

- prescribing procedures to be followed when making a request for access to information;
- prescribing procedures to be followed if an individual requests correction of personal information;
- prescribing procedures relating to the disclosure of personal information that could, in the opinion of an expert, harm the safety or the mental or physical health of the individual concerned or another individual;

- prescribing the categories of individuals who may act for minors, incompetents, deceased persons, or other individuals with respect to personal information;

- requiring government organizations to prepare and publish indexes of information held by that organization;

- prescribing the circumstances in which a person may be excused from paying all or part of a fee; and

- requiring government organizations to provide information relating to the administration of the proposed Act.